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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-636 and No. 75-672
(Consolidated)

No. 75-636

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Petitioner

v.

UNITED STATES OF AMERICA, *Respondent*

No. 75-672

T.I.M.E.-D.C., INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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BRIEF FOR PETITIONER INTERNATIONAL BROTHERHOOD OF TEAMSTERS

OPINIONS BELOW

The Opinion of the Court of Appeals (P.A. 1-44) [1] is reported at 517 F.2d 299.

The "Memorandum Opinion" of the District Court, constituting that Court's "Findings of Fact and Con-

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[1] The following abbreviations are used throughout this brief:

"P.A." references are to the "Appendix to Petition for Certiorari" in #75-636.

"A." references are to the "Appendix" in the consolidated cases printed pursuant to the requirements of Rule 36, after certiorari was granted.

clusions of Law" (P.A. 56-78); and the District Court's "Supplemental Opinion" (P.A. 79-84) are reported only at 6 F.E.P. Cases 690, and 703, respectively.

The District Court's "Decree in Partial Resolution of Suit" (P.A. 85-93); "Final Order" (P.A. 94-116); and "Order" amending final order (P.A. 117-118) are unreported.[2]

JURISDICTION

The judgment of the Court of Appeals was entered August 8, 1975. Timely petitions for certiorari were filed in No. 75-636 on October 29, 1975, and in No. 75-672 on November 6, 1975. Certiorari was granted and the cases consolidated on May 24, 1976.

Jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Civil Rights Act of 1964, as amended—Title VII, §§ 703(a) through (j); and 707(a) through (e); 42 U.S.C. §§ 2000e2(a) through (j); and 2000e6(a) through (e), are reprinted at P.A. pp. 119-124.

QUESTIONS PRESENTED

1. Does a union violate Title VII of the Civil Rights Act of 1964, as amended, solely by continuation of a seniority system created in the 1940's which establishes separate seniority rosters for "road" and "city" motor carrier employees where, on the uncontradicted record, such seniority system was provided in lawful collective bargaining agreements negotiated in good

[2] The pertinent preliminary opinions of the District Court are: "Order," 12/13/71 (P.A. 45-49), reported at 235 F.Supp. 246; 4 F.E.P. Cases 77; and "Order," 1/20/72 (P.A. 50-55), 4 F.E.P. Cases 875.

faith pursuant to the requirements of the Labor Management Relations Act:

(a) with no intent to discriminate on account of race;

(b) constituted a bona fide seniority system, assuring job security for workers who have had no hand in their employer's racial discrimination, either directly or through their collective bargaining agent;

(c) was established in separate bargaining units in conformity with NLRB precedents;

(d) applies equally to whites, blacks and browns in protection of seniority on the basis of entry date into the particular bargaining unit; and thus serves to minimize movement from "city" to "road" (or vice versa) of all employees, regardless of race;

(e) does not involve a "line of progression," and does not affect promotion from unskilled entry level to skilled employment;

(f) is viewed by the Court of Appeals as improper until 1971 (but not thereafter) only because, in that Court's view, its continuation serves to perpetuate the employer's prior unlawful discrimination in hiring.

2. Assuming, arguendo, the validity of a finding of unlawful pattern or practice of racial discrimination by an employer,[3] in fashioning a remedy:

[3] We defer to the employer, TIME-DC, Inc., for the argument in support of question No. 2 in our Petition for Certiorari which challenged the holding below that incumbency statistics were "dispositive," and urged that an "ongoing post-Act pattern or practice of hiring or job assignment must be shown."

Nor do we here argue question No. 4 in the Petition for Certiorari relating to the propriety of proceeding to individual seniority allocations in the absence of the contracting local unions. The latter question is premature at this posture of the case.

(a) May fictional seniority benefits be awarded to all minority employees, solely on the basis of their race, without regard to whether they were individually affected by the unlawful pattern or practice?

(b) Do different standards for determining individual relief under Title VII apply depending on whether the action is an "individual," "class" or "pattern or practice" suit?

STATEMENT OF THE CASE

In January, 1971, the Attorney General brought suit against T.I.M.E.-D.C., Inc. (T-DC), a nationwide motor freight carrier, and the International Brotherhood of Teamsters (IBT), alleging a "pattern or practice"[4] of racial discrimination in violation of Title VII of the Civil Rights Act of 1964.

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[4] § 707(a) of the statute [42 U.S.C. § 2000e6(a)] empowered the Attorney General to bring "pattern or practice" suits in the following circumstances:

> "(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described."

By 1972 Amendment the functions of the Attorney General under this section were transferred to EEOC. See 42 U.S.C. § 2000e6(c), (d).

The claim was that T-DC had engaged in racially discriminatory hiring, assignment and promotion practices against blacks and Spanish-surnamed workers; but that IBT violated the Act only because it was party to collective bargaining agreements which, it was claimed, "perpetuate the effects of the policies and practices of discrimination by race and national origin of defendant T.I.M.E.-D.C."[5] (A. 6), solely because they provided for separate accumulation of seniority in separate "road" and "city" job classifications.[6]

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[5] The claim against IBT was cast somewhat differently when it was stated in the Pre-trial Order, viz, (A. 36):

> "The defendant Teamsters, by itself and through designated sectional conferences and affiliated local unions, is a party to collective bargaining agreements with T.I.M.E.-D.C. which prevent or tend to prevent black and Spanish-surnamed employees from transferring from the lower paying, less desirable job classifications to the higher paying more desirable job classifications, and thus perpetuate the effects of discrimination against black and Spanish-surnamed employees of the company."

In the pre-trial Order the government also claimed that IBT "has failed to agree to modifications of its collective bargaining agreements necessary to prevent the perpetuation of T-DC's discriminatory practices." (A. 37). Another labor organization, the International Association of Machinists (IAM) was the target of similar allegations. There is neither evidence nor finding that modification of the collective bargaining agreements was ever sought or refused.

[6] Almost three years earlier (in May, 1968) a "pattern or practice" suit had been brought against TIME Freight, Inc., (a predecessor of T-DC, which had merged with Super Service Motor Freight, P.A. 5), involving only its Nashville, Tennessee terminal (A. 2).

In November, 1968, that complaint was amended to name Nashville Teamster Local 480 as a defendant. The thrust of the

PROCEEDINGS IN THE DISTRICT COURT

THE TRIAL

A massive nationwide[7] discovery program ensued. Government counsel deposed T-DC agents throughout its system and more than seventy individuals who claimed to have been victims of racial discrimination. FBI agents photographed tens of thousands of pages of T-DC personnel records. Every existent employment record of T-DC or its constituents or predecessors was made available for Government inspection and photographing.

Trial was held before the Honorable Halbert O. Woodward, District Judge for the Northern District of Texas, from May 3 to May 12, 1972. There was no suggestion of separate trial of liability and remedy issues. To the contrary, the pre-trial Order (A. 32ff) the Trial Court's findings (P.A. 56-67), and the whole record demonstrate that all issues of liability and remedy were fully litigated. No issue was reserved

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amended complaint was against TIME Freight's hiring, assignment and promotion policies. Local 480 was joined as a defendant allegedly for having "created and maintained by collective bargaining agreements . . . job progression lines and seniority systems based on race . . ." There is neither evidence nor finding of "job progression lines" or of any seniority systems based on race!

In April, 1971, the Nashville case was transferred to the Northern District of Texas (A. 2) where it was consolidated (A. 3) with the nationwide suit, which meanwhile had been filed, January 14, 1971 (A. 4).

[7] Depositions were taken in San Francisco, Los Angeles, Denver, Oklahoma City, Chicago, Dallas, Memphis, Nashville and Atlanta.

for later trial; indeed, no request for such reservation was made.[8]

By live testimony, or by deposition the Government submitted testimony of fifty-seven persons claimed to be the victims of discrimination,[9] and statistical evidence of ratios of minority to majority incumbent employees as of March 31, 1971.[10]

No statistical evidence was submitted as to the hiring and placement ratios from the effective date of the Act, July 1965 to March 1971.

T-DC submitted evidence detailing its nationwide extensive operations resulting from a series of mergers[11], as well as statistical data covering the period

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[8] The Court of Appeals at P.A. 34 suggests "for all we know, at this stage some on App. C may have suffered discrimination even more egregious than those whom the Government singled out to be persuasive witnesses to establish pattern and practice." 517 F.2d 299 at 319. Again at P.A. 26 the Court of Appeals refers to the "liability stage" and at P.A. 34 refers to postponement of "evidentiary hearings" to the "remedy."

These suggestions of bifurcated trial—that only liability had been determined—and that remedy was yet to be tried are wholly erroneous.

[9] The trial court's original Findings (P.A. 56-78) specified only 41 of these [30 who "suffered severe injury because of the practice and plan of discrimination" (P.A. 63); four "who fall within a gray area" P.A. 64 and 77; and seven who "were clearly not injured by such discrimination."] (P.A. 65 and 78.)

Sixteen additional were noted in the Court's Supplemental Opinion, P.A. 79 at 80, ¶ II.

[10] See Exhibit 204, as summarized in Appendix A to District Court's Findings (P.A. 56ff. at 60; 68-72).

[11] By a series of mergers Time, Inc. progressed from a small operation between Lubbock and El Paso, Texas, to a nationwide operation. T-DC is the result of many mergers of motor carriers. See P.A. 5, note 6, where the details of the merger history are specified.

1967-72 showing that while its total employment dropped, the number of minorities increased in that five-year period. [12] T-DC also introduced evidence countering or explaining certain of the individual claims (A. 564ff).

IBT witnesses explained the history, development and operation of the collective bargaining agreements and the seniority system (A. 654-680) and union efforts to improve minority employment. (A. 649-714).

THE PARTIAL CONSENT

On the last day of the trial, T-DC entered into a consent "Decree in Partial Resolution of Suit" (P.A. 85-93) which the government acknowledged "resolved those issues relating to TIME-DC's alleged pattern of hiring discrimination and its resulting obligation to affirmatively recruit and hire qualified blacks and Spanish-surnamed Americans as new employees, and its alleged obligation to provide monetary compensation for those blacks and Spanish-surnamed Americans whom the United States alleged were individual and class victims of past discrimination. . ." [13]

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[12] T-DC system employment decreased from 7,238 in 1967 to 6,424 in 1972 (a decrease of 11%). During that same period the number of minorities increased from 512 to 677 (an increase of 32.2%).

In the year 1971 new hires were 16.9% minority. And 18.3% of the newly hired western road drivers in that year were minorities.

By 1972 minorities were 10% of the T-DC work force as against 7.1% in 1967. More than 16% of the city drivers and dockmen were minorities by 1972. See Exs. UU (A. 905); VV (A. 910); BBB, Tables 5 and 6 (A. 968-9); CCC (A. 974); MMM (A. 986).

[13] Brief for the United States filed July 16, 1973 in Court of Appeals for the Fifth Circuit, pp. 4-5.

In brief summary, this Consent Degree required recruitment and hire of Blacks and SSA's [14] pursuant to specified procedures, set out qualifications for employment of minority persons, provided priority hiring for certain classes of minorities, and required prospective hiring in the ratio of at least one Black or SSA "for each white hired or transferred in vacancies in each job classification at each of its terminals and facilities until the number of Blacks and Spanish-surnamed Americans in each job classification at each terminal and facility is equal to the percentage of Blacks and Spanish-surnamed Americans in the city . . . where the terminal or facility is located. . ." (P.A. 85-93).

The Consent Decree further required T-DC to pay $89,500.00 to the government for distribution to alleged discriminatees in amounts to be determined by the plaintiff's attorneys, not to exceed $1,500.00 to any person, and left jurisdiction in the district court "for such further relief or other orders as may be appropriate." (P.A. 91-92).[15]

THE DISTRICT COURT'S FINDINGS

The consent decree left for court determination the validity of the seniority system, allocation of individual seniority, and identification of "those individuals, if

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[14] In the interest of brevity throughout this brief we refer to "Spanish-surnamed Americans" as "SSA."

[15] There has been compliance with the requirements of the Consent Decree. Periodic compliance reports continue to be filed with the District Court, and have not been challenged.

any, who are entitled to relief under Paragraph 13(a) of the Consent Decree." (P.A. 58).[16]

The trial court viewed this as a "three step process: (1) was there a general plan and practice of discrimination by TIME; (2) was there discrimination against a person either as an individual or as a member of a class; and (3) what relief should be given each individual discriminatee" (P.A. 58-59).

A. Liability

As to liability, the District Court found that T-DC and its predecessor companies had been engaged in a plan and practice of discrimination in violation of Title VII. (P.A. 61.)

The liability finding was based upon statistics as to incumbency in March, 1971, (P.A. 60; 68-72), which "statistics alone [the District Court held] are sufficient to show a prima facie violation of Title VII" (P.A. 60).[17]

In addition to the prima facie statistical finding, the

[16] Paragraph 13(a) provides (P.A. 90):

> 13. All job vacancies at T.I.M.E. D.C. terminals and other facilities at which it employs personnel shall be filled in the following sequence:
>
> (a) By those persons who may be found by the Court, if any, to be individual or class discriminatees suffering the present effects of past discrimination because of race or national origin prohibited by Title VII of the Civil Rights Act of 1964.

[17] The District Court made no mention of the improvements in minority employment since 1967. See note 12, *supra*, p. 8. Nor was any attempt made by that Court to compare the incumbency situation with that which obtained in 1965, when the Act became effective. The government had not provided any evidence by which such comparison could be made.

District Court found that thirty named individuals (P.A. 63; 73-76) suffered severe injury because of T-DC's racial discrimination, and four additional were "very possibly the objects of discrimination and . . . were likely harmed by such discrimination" (P.A. 64; 77).

Based on the statistics and the findings as to 34 named individuals,[18] the District Court concluded that T-DC "and its predecessors engaged in racial discrimination. . ." (P.A. 60-61).[19] The time frame within which the discrimination occurred was not specified.[20]

[18] Thirty-four out of the fifty-seven as to whom the Government had presented evidence of alleged discrimination. See note 8, *supra*, p. 7.

[19] The District Court specifically defined the practices (P.A. 60-61):

> (a) Numerous qualified black and Spanish-surnamed American applicants who sought line driving jobs at the company over the years either had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that whites were considered and hired.
>
> (b) Numerous qualified black and Spanish-surnamed American employees who have sought transfer to line driving jobs at the company have either been denied the opportunity to do so, or have not been permitted to transfer on the same basis as whites.
>
> (c) At its Nashville terminal, the company has trained whites, but not blacks, to be mechanics, partsmen and shop supervisors.

[20] As specified in the finding quoted in the preceding footnote, discrimination against those minorities who sought road jobs occurred "over the years" (P.A. 61). Examinations of the findings as to individual discriminatees (P.A. 73-77) discloses that most of these occurred prior to July 1965, the effective date of the Act.

The Court of Appeals found that since 1969 there has been

The union collective bargaining agreements were found "neutral on their face"; but nevertheless were held to "operate to impede the free transfer of minority groups into and within the company" (P.A. 61). Accordingly, the District Court concluded as to defendant IBT, P.A. 61-62:

> It is not the intent of this Court to order the Union to completely revise their seniority system, however, it is the ruling of this Court that neither TIME nor the Unions can set up the seniority system or the collective bargaining agreements to impede the natural infiltration of minority groups into and within the more advantageous jobs through TIME's employee hierarchy and the order of the Court, hereinafter described, will enjoin the Unions from interfering with relief here granted as well as the relief ordered by this Court's decree of May 12, 1972.

Although in briefs to the District Court the Government had alleged that the seniority system was unlawful, no such finding was made by the District Court; and the seniority system was left intact. As we shall see, individual workers as to whom there was proof that but for T-DC's discrimination they would have enjoyed additional seniority were granted that seniority. See *infra*, p. 13. The seniority system, as such, was not altered.

"laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment." (P.A. 27-28.)

The record is void as to the hiring and assignment practices in the period 1965-69; though it appears that mergers and acquisitions in '67, '68 and '69 brought going enterprises, including incumbent employees, at the same time total employment was diminishing. See Exhibits TT, VV; A. 899-909, and Testimony at A. 474ff.

B. The District Court's Remedy

The District Court in fashioning relief noted the Government's claim that all of the more than 300 minority T-DC incumbents hired prior to March 1971 were members of an affected class, but rejected the assertion that all should have full and uniform relief. The Court held, (P.A. 62):

> The plaintiff claims that since these people were hired during a period in which TIME was practicing a plan and pattern of discrimination, that they are members of a class affected by TIME's discriminatory practices. The Court accepts this view to the extent that all are members of an affected class. However, this Court does not hold that all members were injured individually by being within the class, or that those who were injured were all affected to the same degree. This Court, in fact, does hold that some were not injured by being a member of the class, and that those who were injured were injured in varying degrees. There are no degrees of discrimination—discrimination is discrimination, and if made on the basis of race is deplorable whatever the degree; however there are degrees of injury due to that discrimination—and this is important in determining the equitable relief this Court should afford these individuals.

Accordingly, the relief accorded by the trial court to minority employees was apportioned in accordance with the trial court's view of the degree to which each was damaged by the employer's racial discrimination.[21]

Four sub-groups of the minority employees were specified, viz.:[22] (A) thirty persons, all of whom were

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[21] See Trial Court's "Final Order," P.A. 94 at 100ff.

[22] See Trial Court's Opinion of October 19, 1972; P.A. 56 at 62.

found to have suffered severe injury because of the class discrimination, were granted the right (denied to white employees) to transfer to road employment with substantial fictional road seniority; (B) a second group, found by the District Court to fall within a gray area, as to whom the evidence was insufficient "to show clear and convincing specific instances of discrimination or harm resulting from discrimination," yet believed by the District Court to be "very possibly the objects of discrimination . . ." and "likely harmed by such discrimination," were given the opportunity to transfer to road jobs with lesser seniority carryover; (C) a third group, as to which "the evidence fails to show that there was any injury or harm as a result of TIME's discriminatory practices," and found "clearly not injured by such discrimination," were denied relief. A fourth group (of over three hundred employees), as to whom the District Court "has no evidence to show that these individuals were either harmed or not harmed individually by the discrimination to the class as a whole," were held entitled to road vacancies [23] with seniority as of the date of future entry into road employment.

By Supplemental Opinion (P.A. 79-84) minor amendments were made; and a "Final Order" (P.A. 94-116), as amended (P.A. 117-118) was entered. The Order, as amended, required transfer of employees in three specified groups and enjoined T-DC and IBT, their officers, agents, etc. "from engaging in any act

[23] The trial court originally provided for their preference over "the general public" (Opinion of October 19, 1972) (P.A. 65); but later, over the union's objection, granted this group preference over incumbent white city employees (Order of March 19, 1973), (P.A. 117).

or practice at any of TIME's facilities which has the purpose or effect of discriminating against any individual because of his race or national origin" (P.A. 95).[24]

All parties appealed. The defendants challenged the finding of "pattern or practice," and the relief as to certain individuals and all those named in Appendix C. The Government objected that the District Court's remedy was insufficient.

THE COURT OF APPEALS' OPINION

A. Liability

The Court of Appeals for the Fifth Circuit (P.A. 1-44; 517 F.2d 299) wrote much more extensively than had the trial court.[25] It made findings as to liability, holding that "the decisive significance of flagrant sta-

[24] The amended order specified procedures for notifying beneficiaries of the relief awarded (P.A. 95-96), and ascertaining present qualifications (P.A. 96-97). Beneficiaries were to be transferred to road vacancies at specified terminals (P.A. 97) with 30 day retreat rights *(Ibid.)*; procedures for effecting transfers were specified (P.A. 97-98); "vacancies" were defined (P.A. 98). Rights of "bumping" and limited inter-terminal transfers were provided (P.A. 99).

The Order as amended then directs the sequence of transfer in three listed groups, divided according to degree of harm (P.A. 101-102), and directs T-DC to provide job training to named individuals.

Finally, the Court enjoins union interference with the Court ordered relief (P.A. 102); and requires T-DC to make periodic reports (P.A. 103).

[25] The Government did not assert in its appeal to the Court of Appeals that any of the District Court's findings were "clearly erroneous." Nor did it seek specific additional findings. Nevertheless, the Court of Appeals essayed a full *de novo* review of the record, and made findings beyond those published by the District Court.

tistical deviations" (P.A. 23), buttressed by testimony as to individual instances (P.A. 24), proved that "the defendants (sic) have engaged in an extensive pattern of employment practices unlawful under Title VII and that strong remedial action is warranted." (P.A. 29).

In making the liability finding the Court specifically rejected the use of "the analytical steps delineated by the recent case of *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792 (1973), 93 S.Ct. 1817, 36 L.Ed.2d 668 . . . [as] inapplicable to a pattern and practice suit such as the one before us . . ." (P.A. 27).[26]

The *only* union dereliction found was that "the seniority system created by its contract perpetuates the effects of [the employer's] past discrimination" (P.A. 29).[27]

The government had complained in its Brief to the Court of Appeals that: "The district court permitted the defendant company and the Teamsters to maintain the discriminatory seniority system . . ." and "The District Court erred in so permitting the discriminatory seniority system to continue . . ."; for, the Government said: ". . . a system of seniority based on length of service in a job classification is itself unlawful under Title VII for all members of the class and must be changed in order to comply with the Act." Government Brief to Court of Appeals at p. 39.

[26] In the companion *Rodriguez* case the Circuit Court held *McDonnell Douglas* v. *Green* inapplicable in a Title VII private class action. 505 F.2d 40 at 55-56.

[27] The Court had earlier found, P.A. 18, that "the basic seniority issue in this case—whether a discriminatee should be allowed to transfer from city operations to LD (and thus from one contract to another) with full carryover terminal seniority—is neither specifically prohibited nor even addressed by the contracts . . ." (P.A. 18).

The 1970 addition of a specific non-discrimination clause in the collective bargaining agreement was noted as indicative of "good intentions and recent improvement" (P.A. 27-29) but insufficient to avoid liability (P.A. 29).

The Court of Appeals left the seniority system intact, but, as we shall see, granted fictional road seniority to all minority employees, without regard to whether they had been adversely affected by racial discrimination.

And despite current "laudable good faith effort to eradicate the effects of past discrimination" (P.A. 27-28), the Court held that both T-DC and IBT "have engaged in an extensive pattern of employment practices unlawful under Title VII and . . . strong remedial action is warranted" (P.A. 29).

B. Remedy

The Court of Appeals rejected the trial court's remedy, holding, 517 F.2d 299 at 319, P.A. 34:

> ". . . we cannot accept the gradations of App. A, App. B, and App. C. For all we know, at this stage[28] some on App. C may have suffered discriminations even more egregious than those whom the Government singled out to be persuasive witnesses to establish pattern and practice. All those on App. A, App. B and App. C are entitled to be

[28] The Court of Appeals' reference to "at this stage" would appear to indicate the Court believed that the trial had been bifurcated; that only liability had been determined—and that remedy was yet to be tried.

Actually, in a single, lengthy trial after literally years of discovery and depositions systemwide there was full trial on issues of both liability and remedy. See note 6, *supra*, p. 5.

given an opportunity to bid on future vacancies in the specified job classifications to which they are allowed to transfer by the District Court's order on the basis of their seniority and, if they qualify for those jobs, to be permitted to exercise their full seniority in such jobs for all purposes, including bidding and layoff."

Having jettisoned the District Court's remedy, the Court of Appeals held all minority employees entitled to preference for road jobs with fictional road seniority from the date each "had the experience necessary to qualify him for a road driving job," without regard to whether they had ever indicated a desire to transfer, or had otherwise been shown to have been affected by racial discrimination;[29] held inoperative as applied to beneficiaries of this lawsuit a provision of the pertinent collective bargaining agreement which assured laid-off employees preference in reemployment for a three-year period; in spite of the fact that the court acknowledged "that the union contract provision granting laid-off L.D.s [road drivers] a three year period in which they may move into vacancies at their home terminal without competition was not adopted for discriminatory purposes," 517 F.2d at 322, P.A. 40-41, the Court of Appeals modified the bidding procedure in a portion of T-DC's operations "in a manner that would speed up the advancement of discriminatees into the [road] position . . .,"[30] vacated certain provisions of the District Court's order relating to minorities as to whom there was no proof of injury; altered the Southern

[29] See 517 F.2d 318; P.A. 34, 35.

[30] 517 F.2d at 323, P.A. 43.

Area seniority system[31] and remanded for further proceedings consistent with the Opinion.

SENIORITY

The Opinion of the Court of Appeals at P.A. 7ff. identifies T-DC's four separate seniority units—road, city, garage, and office; and correctly notes that competitive seniority (which determines the order of bid, lay-off and recall) is measured from date of entry into the particular seniority unit; while benefit seniority (measuring eligibility for vacations, pensions, fringe benefits) takes into account total service, in whatever unit. The seniority rights are limited to terminal domicile.[32] See P.A. 7ff.

[31] The road seniority system in the Southern Area permitted laid-off road drivers to bump junior road drivers at other terminals of the same employer within the Southern Conference.

The Court's revision (P.A. 44; 517 F.2d 293, 324) permits a laid-off senior road driver to bump juniors at other terminals, but precludes such move where a vacancy exists and is desired by any "affected class" member. The laid-off road driver who bumps a junior driver at another terminal may exercise his right of recall when an opening occurs at his own terminal, but when an opening occurs at the terminal where the bump took place, members of the affected class may compete on the basis of seniority with the road driver on lay-off who was bumped (or with any other road driver on lay-off at that terminal). Finally, to "speed up the advancement of discriminatees into the road driver position" members of the affected class in the Southern Conference may bid on road driver openings at other terminals within the Conference in competition with employees at that terminal on the basis of employment seniority after all members of the affected class at that terminal have been given the opportunity to bid on the position.

[32] Except as modified in the Southern Conference. See note 31, *supra*.

But neither District nor Appellate Court describes the history and development of the bargaining and seniority patterns, the contract structures, the economic forces which formed them, the factual context in which they grew and now operate, or the policies which justify them.

The statute by § 703(h) makes significant the determination of the bona fides of a seniority system. Accordingly, we present a more complete description than is provided by either of the lower courts, viz.:

The collective bargaining structures, and seniority patterns in the motor carrier industry are the products of the economic history and development of the industry, wholly unrelated to race or national origin. The parties stipulated that race had nothing to do with the establishment of the bargaining patterns. See A. 49, P. 3(17).

Industrial peace in the motor freight carrier industry is maintained by collective bargaining, the product of the policy announced in the National Labor Relations Act, 29 U.S.C. § 151ff. Since 1964 the National Master Freight Agreement (NMFA), fleshed out by twenty or more Area or Industry Supplements, and literally hundreds of local riders, has governed the wages, hours and working conditions in that majority segment of the industry which is organized.

It was not always so. Collective bargaining in trucking began with single employers on a local basis. In the '20s and '30s inter-city (now known as "road") transportation was chiefly by rail. In much of the nation until the middle 1940's neither the roads, nor then available trucking equipment could handle the bulk of the inter-city traffic. Until after the second

world war there was only one transcontinental motor freight carrier.[33]

Local Cartage Operations

Accordingly union organization in the motor carrier industry began in local cartage—some as early as the horse and wagon.[34] When recognition was obtained it was on a local unit basis; accordingly seniority was measured and applied on a local unit basis.

Separate contracts, each individually negotiated on a local basis, were the best the workers could achieve until in the depression days of the '30s there were bitter and successful strikes for city-wide recognition [35] which resulted in uniform wages and conditions within particular metropolitan areas. In the early 1950's union leaders sought to eradicate differentials between cities by obtaining state-wide—then regional—and finally area contracts.[36] Thus uniform wages, conditions and seniority standards were ultimately (in 1955 in Central

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[33] Histories of Teamsters' organizational efforts, successes and failures may be found in Farrell Dobbs: *"Teamster Power,* Monad Press, N.Y. 1973; Leifer, *The Teamsters Union,* Bookman Assoc., N.Y. 1957; 132-192; James & James, *Hoffa and the Teamsters* (A study of union power), Van Nostrand, N.Y. 1965.

[34] The Teamsters registered trade-mark emblem combines the horse and the wheel.

[35] See James & James, *Hoffa and the Teamsters* (A study of union power), Van Nostrand Co., Inc., N.Y. (1965) at Chapter 5, pp. 89-127.

[36] As we shall see (pp. 22-23) road organization, though commencing long after city contracts were obtained, shortly obtained strong, standardized area contracts. Local cartage continued ancient patterns, "a staggering diversity of contractual provisions, stemming from many years of independent isolated negotiations." James, Op. Cit. p. 125.

States; 1957 in the South) attained for city employees.[37] But since city employees were attached to a particular local "city" terminal—and seldom, if ever, moved from one city to another—the local terminal seniority pattern continued. Lay-off and recall were to be in local terminal seniority order. And when (in the 1940's) union bargaining influence grew to the point that such worker benefits as selection of shift or starting time—and (later) even route selection—were no longer at the unilateral whim of the employer, the "city" collective bargaining contracts provided for periodic postings and selections in seniority order.

Road Operations

Meanwhile, the truckers' road operations were beginning to take more of the rail's intercity freight. Originally, low capital requirements [38] meant easy entry and intense competition. The economic structure of the over-the-road trucking industry was numerous small-scale entrepreneurs.[39] If the union organized at point A and raised wages, there soon came firings or lay-offs there, and new hires were domiciled at point B where

[37] The union refused to sign the 1955 over-the-road agreement unless the employers agreed to an areawide local cartage agreement which eradicated wage differentials ranging from $1.25 to $2.50 per hour; and hour variations from 60 to 40. James, Op. Cit. p. 125.

[38] The state built and maintained the highways, the local terminals were already built. All that was needed were trucks and drivers.

[39] Some were exclusively "city"—others were exclusively "road." See A. 652-661. Even as recently as 1960 the number of interstate for-hire carriers operating under ICC permits exceeded 17,000. And 80% of these had an annual gross revenue of less than $200,000.00. In addition, thousands of similar intrastate, inter-city road carriers operated under state permits.

there was no organization. So efforts for road organizing were coordinated to include both A and B—and actually to include the entire road system. These road organizing efforts were proposed in the mid-30's and, although the IBT's International President Tobin, who feared interference with local Teamster jurisdiction, originally opposed such efforts, he finally acquiesced.[40]

Road organization was successful in most of the nation by the end of World War II, and area road bargaining patterns were established by the late 1940's through centralized bargaining—[41] first in the Central States Drivers' Council, later in the respective regional area Southern, Western and Eastern Conferences. Uniform wages and conditions for road drivers eradicated the north-south wage differential and established seniority as the basis for determining order of lay-off and recall, and the order of bid for "regular" runs or "extra-board" assignments.

The separate road-city seniority patterns thus evolved and were firmly established a generation before Title VII was passed. Race had nothing to do with it. The evolution of these bargaining and seniority patterns had no adverse effect upon the black—the only impact upon minorities was to bring those whom the industry employed to the same wage levels as their

[40] See James, op. cit. at 91 ff.

[41] Meanwhile, the trend toward merger of inter-city lines accelerated. Large area, and even nationwide trucking firms were put together by purchase, merger or other form of acquisition. The T-DC growth is typical.

See Kaplan, David, "Negotiating Problems of the Trucking Industry," Proceedings of the Conference on Industrywide Collective Bargaining, May, 1948, Univ. of Penna. Press, pp. 81-87.

white brothers, and to assure that, when hired, they would have the same seniority protections as all other workers.

Present National Bargaining Pattern

Bargaining in motor freight evolved, as we have seen, at first sporadically on an extent of organization basis, then through local, state, regional and area; finally, in 1964 national bargaining was achieved.[42]

The national pattern does not strait-jacket the entire nation into absolute uniformity. The bargaining takes account of area and local differences. The device by which this is done is a three-part collective bargaining agreement. The National—negotiated at the national level—the Area Supplements,[43] negotiated by Area Committees; and local union riders.

At the national level there is commitment to the principal of seniority. But the specific seniority system to be applied is negotiated at the Area level and is specified in the various area supplements, sometimes modified by local riders.

Thus the NMFA in Article 5 (A. 804) provides as to seniority:

> "Seniority rights for employees shall prevail under this Agreement and all agreements supplemental hereto . . . The extent to which seniority shall be applied and accrued as well as the methods and

[42] The agreements since then have been of three year duration: 1964-67; 1967-70; 70-73; 73-76. (A. 512ff.) The 1976-79 agreement has recently been settled.

[43] Within each Area, there are separate supplements for road, city, office and garage, respectively.

> procedures of such application shall be clearly set forth in each of the Supplemental Agreements."

The specific seniority system to be applied later appears in the respective Area Supplement.[44]

For example, Article 42 of the Southern Conference Area Local Freight, etc. Agreement provides that a list of all "city employees."[45] shall be posted periodically, arranged in order of seniority. Thirty days is allowed for protest, else the posting is final. Controversies as to seniority are to be settled through the grievance procedure. "Terminal seniority" is to prevail.[46] The last hired is the first laid off. Jobs are bulletined at least every six months and those with the greatest terminal seniority have first choice in job selection.[47] This is the traditional scheme; it has been so for more than a generation.

Similarly, the Southern Area "Road" supplement (A. 823ff, Art. 42, § 4) provides for posting of listings

[44] There are thirty-six separate Area or State Local Supplements. (A. 513.) These are negotiated by Area Negotiating Committees, (A. 504ff.); and apply to local practices with regard to seniority, often unique to the particular location. (A. 510.)

[45] I.e., checkers, drivers, switchmen (hostlers), forklift operators, riggers and dockmen. See Article 55, Southern Area Local Supplement.

[46] Exceptions are provided in instances of "Change of Operations," Art. 8, § 6; and sale or merger. (A. 813.)

[47] Thus within the "city" classifications an employee may drive for a period, then decide to operate a forklift, or become a "checker" at the next posting. The wages are the same. See Art. 55. So. Area Local Supplement.

There is no "line of progression" under these contracts. Entry into any classification is at top rate. (P.A. 6.)

of road drivers domiciled at a particular point,[48] and bidding for road "runs" at twelve-month intervals, or as vacancies develop. The separate supplements covering garage and clericals, respectively, make substantially similar unit seniority applications with respect to bidding, lay-off and recall.[49]

Following this pattern, the wages, hours and working conditions including the seniority position of most of the T-DC drivers, dockmen and mechanics, and several groups of its clericals, are provided in separate collective bargaining agreements with eighty-three separate autonomous local unions chartered by the IBT.[50] Several hundred separate agreements with the many autonomous local unions, cover specified separate groupings of employees, i.e. "Road," "City," "Clerical" and "Garage."

There is no "line of progression" from road to city, or from any classification within a particular supple-

[48] T-DC has many more terminals than it has road domiciles, i.e., fifty-one terminals, but only twenty road domiciles. (P.A. 18.) As highways and trucking equipment improve the trend is toward fewer road stations, and larger numbers of road drivers at each. Thus, where there originally were several road domiciles between Dallas and Los Angeles, now a team of two drivers in a sleeper-cab drive the entire distance; usually making two round trips per week.

[49] Other seniority applications, i.e. vacations, holidays, pensions and other fringe benefits are based on total time employed, without regard to specific terminal location, or work classification.

[50] See Appendix B to Pre-Trial Order, A. 114-70, where the locals and their respective agreements are listed. And in some areas, city contracts are separate for "heavy duty," "city" drivers and "dockmen."

mental agreement. Choices of "runs", starting times, day or night shifts, regular or "extra board" allocations are made on the basis of date of entry into a job classification covered by the particular supplemental agreement.

These seniority practices did not spring up in an arbitrary or irrational fashion. Until there was a union contract there was no seniority.[51] And if "city" workers organized before their road brethern, they were not anxious to afford to road drivers bidding rights to their city jobs, when years later, the road became organized.

There were also operational reasons for the separate seniority listings. In those few instances where road and city were originally organized simultaneously and grouped in a single list, they soon were divided into the conventional separate "Road" and "City" groups, for it was found that frequent transfer diminished both the opportunities of the workers and the profits of the employers.[52] It is obviously more efficient and economical to retain in the city a driver who "knows the territory," is acquainted with city routes, parking facilities, customer personnel, et al., than to permit the road driver to bid a city run and then train him in the necessities of the city operation. The freight lines, whether union or non-union, uniformly establish their

[51] See A. 778, witness Dixon: "Seniority is a creature of contract . . . if an employee doesn't have either an individual contract or a collective contract providing for seniority he is at the whim of the employer . . . Our [the Union's] first concern always has been when people are organized . . . to set up seniority protections."

[52] Cf. Dixon's testimony at A. 656. Road drivers who spent the summer in northern climates, then bumped into the city down South in the winter, disrupted both the city drivers' morale and the functioning of the employer's business. (A. 660.)

supervisory hierarchy and management controls recognizing the functionally distinct "road" and "city" operations. And, except for T-DC, the employers in the industry traditionally have barred transfer from city to road. The "no-transfer" rules have been unilaterally imposed by the employer. As the Court of Appeals recognized here (P.A. 18), the union contracts do not prohibit transfer.

The functional distinctions between "road" and "city" are apparent from the disparate working conditions. City drivers work a guaranteed 40-hour week and receive an hourly wage and time and one-half over 40 hours. Road drivers are paid by the mile, with the mileage rate formulated to approximate the road driver hourly rate applicable to non-driving work. They have no guaranteed work week. Most work 60 to 70 hours per week, with no premium for overtime.

But despite the absence of a weekly hour guarantee, many road drivers have an opportunity to earn a larger annual income than that paid to city employees by working much longer hours.[53] At the same time, road drivers have living expenses away from home domicile, work much longer hours than their city brethren, and generally are away from homes and families.

City drivers have many short hauls, and much time is spent in personal contact and sales efforts with customers. Road drivers have single long hauls with no customer contact.

Because of the guaranteed nature of the work-week, and the ability to work regular hours while enjoying

[53] Compare annual income road and city in 1969 (A. 898) with comparative income in 1971 (A. 986).

home and civic life, many employees choose and prefer city work. On the other hand, those with less family or civic ties—or those willing to forego them for the opportunity of more total pay at the expense of 60 to 70-hour work weeks—prefer the road. As to which is more desirable, "it depends on the individual." (A. 665-667.)

There are large practical difficulties involved in working "city" and "road" from the same seniority list—or even assigning casual road work to city drivers, or vice versa. Road drivers must adhere to government-required hours of rest. City drivers usually work in day time—road at night (although some city operations are 24-hour, three-shift affairs). Constant interchange would deprive the city driver of the personal sales contact which grows from daily familiarity with the customers on the city route. And the layover time frequently experienced by the road driver waiting for a back-haul makes the time of his return to home base indefinite. At best it is not definite enough to permit him to return timely to man a city truck and meet the precise pick-up and delivery scheduling which the customers demand.[54]

For these and other reasons, the NLRB has traditionally treated the separate "road" and "city" classifications as functionally distinct, and has long ago determined that it is proper to treat city and road units separately for collective bargaining purposes. Thus in *Georgia Highway Express,* 150 NLRB 1649 at 1651 (1960) the NLRB held:

> ". . . The Board has long held that local drivers and over-the-road drivers constitute separate

[54] Cf. A. 660-663.

> appropriate units where they are shown to be clearly defined, homogeneous, and functionally distinct groups with separate interests which can effectively be represented separately for bargaining purposes. . . .
>
> In view of the different duties and functions, separate supervision, and different bases of payment, it is clear that the over-the-road drivers have divergent interests from those of the employees in the [city] unit sought and should not be included in that unit."

Accordingly, it is here stipulated: "The government does not allege . . . that the bargaining units were established for the purpose of discrimination on the basis of race or national origin (A. 49; Pre-trial Order, ¶ 3(17)).

Not only is it shown that the seniority system was not established to effect discrimination; it affirmatively appears that Teamsters early understood that employers played off black against white to undercut the wages and conditions the unions were attempting to establish.[55] Accordingly, IBT unions have made

[55] As Dixon explained the situation in Texas in the mid 40's, (A. 676):

> "Well, when I first got in the union the situation was, as it was then in most of the South, if I—at first I didn't own a car, so I had to ride the bus, or streetcar to go back and forth to work myself, and I sat in the front of the bus by law and the black had to sit in the back.
>
> By the same token, when I first got in the union and went to the union hall, why, I noticed that the whites sat in the front and the blacks sat behind. One of my first jobs was trying to organize and I discovered that the employers in my mind took advantage of the situation to the extent that some of them would, when we organized, some people would stay in the freight at one company, or in the warehouses, particularly, and got some little better wages and conditions, then the

special effort to organize minorities, and are color blind with respect to participation in union affairs and application of collective bargaining contracts.

While IBT unions are made up of various ethnic groups,[56] all who perform similar work have similar wages and conditions. It was not always so. Particularly in the South, in the 1940's, and even into the early '50's there were strikes to obtain recognition and to eradicate the black-white wage differentials for the same job. IBT has been at the forefront in lobbying for Civil Rights legislation, including that upon which this suit is based, (A. 677-678) and in expending union time and treasure in educational and upgrading efforts for minority workers (A. 699; A. 575-576; 611ff., Ex. QQQ).[57] And by 1970 the employers agreed to the

> employer sought to hire blacks and put them to work as non-union because they would put them to work cheaper. So we particularly tried to go out and see if those people wanted to get organized so that we could bring them up to the same level so that there wouldn't be unfair competitive situations between the workers.
>
> Now, the people we were able to organize who were black . . . were organized into our union and had contracts or came to our union meetings, that all people would have to be treated alike. That included seating or voting or anything else in our union, so that's the way it was from that point forward."

[56] One of those brought to deposition by government counsel testified that the IBT local to which he belonged was a veritable "League of Nations", and as reported in the Department of Labor's Monthly Labor Review for March, 1968 at p. 70, the Teamsters take pride in the fact that ". . . our union does not equivocate or pussyfoot on the race question. On the job and at the hall all members are union brothers . . ."

[57] The official publication of the U. S. Department of Health, Education and Welfare in its November 1971 issue (Ex. QQQ, A. 988 at 990) describes the Teamsters-initiated Transportation Opportunity Program, which effectively educates minorities in truck-driving skills. Cf. A. 699-714.

union proposal that the NMFA agreement include Article 38, which provides:

> The Employer and the Union agree not to discriminate against any individual with respect to his hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex, or national origin, nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of his race, color, religion, sex, or national origin.

In sum: The seniority system is traditional, established in bargaining units which NLRB has designated based upon historical processes in the growth of collective bargaining in trucking industry—and is color-blind. Black, white and brown are treated equally without regard to race or national origin. At T-DC,[58] each may freely transfer between jobs covered by different contract supplements. When he does he carries his "company" benefit seniority with him, but establishes "unit" seniority from the date of entry into the unit. That unit seniority determines the order in which he may bid for posted "runs" or "shifts"; and also determines order of lay-off and recall. These privileges of employment were assured by collective bargaining agreements which established traditional bona fide seniority systems.

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[58] This employer's permission freely (A. 517) to transfer is somewhat unique to T-DC. Most of the industry unilaterally forbade such transfers. See *Jones* v. *Leeway*, 431 F.2d 245 (C.A. 10, 1970), cert. den. 401 U.S. 954 (1971); *Sagers* v. *Yellow Freight System*, 388 F.Supp. 428 (N.D. Ga., 1974), affirmed, 529 F.2d 721, pending on rehearing (C.A. 5, 1976); *United States* v. *Leeway Motor Freight Lines*, 7 FEP Cases 710 (W.D. Okla., 1973); *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416 (C.A. 6, 1974).

Within this seniority framework, T-DC as of 1969 employed 1,828 road drivers and 2,674 within the "city" units. Of the "city" group 209 were black; 181 were SSA; for a total of 390 minority workers. (P.A. 21).

Any of the 2,674 city employees who transfer city to road—whether the more than two thousand whites, or the almost 400 minorities—begin "road" seniority as of the day of entry into the road unit. If this seniority system deters the almost 400 minority employees from transfer to the road, it similarly deters more than two thousand whites. Obviously, it was not designed to deter 2,000 whites from transfer in an effort to slow down the 400 blacks from similar movement.

The seniority system has evolved through almost two generations as the most efficient way of providing job protection to the employees while providing the stability necessary for the employer to get the freight moved. And there is not a scintilla of evidence that it is intended to effect racial discrimination.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act should be applied to achieve two objectives: (1) to forbid racial discrimination and "make whole" its victims; and (2) to prohibit preference to any group on account of race.

1. The Seniority System Is Lawful

The existing seniority system is bona fide within the meaning of Section 703(h) of the Act. It is facially valid and provides a means for assuring that every victim of racial discrimination is accorded the rightful place he would have achieved but for the employer's discrimination.

The Court of Appeals erred in concluding that the IBT engaged in a pattern of unlawful employment practice solely by maintenance of this seniority system. No other union practice is questioned.

The IBT position throughout the litigation has been to insist, in accordance with the collective bargaining agreements and the practice under them, that victims of racial discrimination be awarded the seniority which would have been theirs had there been no discrimination.

Section 703(h) of the Act, its legislative history, this Court's *Franks* v. *Bowman* decision, NLRB decisions and the history and application of the system itself, all support the view that continuation of this seniority system does not violate Title VII.

2. The Proper Remedy for Unlawful Discrimination

The Court of Appeals erred in refusing to focus on the victims of racial discrimination, instead providing enhanced seniority for all minority workers, regardless of whether they had been adversely affected by unlawful racial discrimination.

While Congress sought to "make whole" the victims of racial discrimination, it specifically forbade any grant of racial preference. The Court of Appeals' wholesale grant of seniority preference to blacks and Spanish-surnamed Americans and its refusal to limit relief to those who were the actual victims, amounts to impermissible reverse discrimination.

The District Court's method of identifying the actual victims and making each whole by installation in

the "rightful place" he would have occupied but for racial discrimination is consistent with the approach later specified by this Court in *McDonnell Douglas* v. *Green,* 411 U.S. 792; and by the NLRB in making whole victims of anti-union discrimination under the National Labor Relations Act, the model upon which Section 706(g) was patterned. The Court of Appeals erred in jettisoning this approach.

The Court of Appeals also erred in modifying the collective bargaining agreement which assured laid-off employees recall rights for a period of three years. This provision was not adopted for discriminatory purposes, and does not block any individual from the "rightful place" he would have enjoyed absent racial discrimination.

Nor is there basis for revising the Southern Conference seniority system by which laid-off road drivers may displace juniors within the specified area. This provision of the collective bargaining agreement is likewise "neutral" on its face, and does not impede "make whole" awards. The Court of Appeals' rationale that this provision "would tend to impede advancement of Blacks and SSAs" into road positions is invalid. The Act does not assure advancement, nor authorize removal of impediments to advancement. Racial victims may be made whole without alteration of the contract. They are entitled only to be made whole—not to preference in advancement.

ARGUMENT

In application of Title VII of the Civil Rights Act, two clear Congressional objectives should be at the fore: (1) to forbid racial discrimination and to "make whole" those who were damaged by racial discrimination; and (2) to guard against the conferring of pref-

erential rights upon any group on account of race or national origin. Congress clearly prescribed "make whole" remedies, while forbidding "preferential" remedies.

With these objectives in mind, we inquire first as to the validity of the Court of Appeals' holding that IBT violated Title VII, and then address ourselves to the problems of identifying those who were damaged by the employer's racial discrimination, and formulating a remedy which will make whole the actual victims of racial discrimination without granting preference to those who were not adversely affected thereby.

1. The Seniority System Is Lawful [59]

Here, as in *Franks* v. *Bowman Transportation Co.*, — U.S. —, 47 L.Ed. 2d at 456, "[t]he underlying legal wrong . . . is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system." The employer here, as there, had sole responsibility for hire and job placement. (P. A. 60-61.)

This basic unlawful employment practice found by the courts below was, as the government admitted in its brief to the Court of Appeals, (see p. 8, *supra*) fully remedied by the consent decree by which this employ-

[59] Issues concerning the legality of the seniority system are fully discussed in the brief filed by the Southern Conference of Teamsters in a related case, *Teamsters Local 657* v. *Rodriguez* (Consolidated Nos. 75-651, 75-715 and 75-718). There, again, it is pointed out that: (1) the seniority system is non-discriminatory both in its origin and on its face; (2) is favored by a substantial majority of affected employees, including minority employees; and (3) contract rules provide for the rights of discriminatees and guard against reverse discrimination. There, as here, a finding of union violation of and liability under Title VII by the Court of Appeals effects reverse discrimination which Title VII prohibits.

er's unlawful hiring and placement practices were prohibited and the victims compensated.

Proof that an employer violated Title VII is not proof that the union did so.

No union violation is even alleged, other than the continuation of the seniority system which measures competitive seniority from entry into the particular classification, road or city. The Court of Appeals' finding that IBT violated Title VII can be supported only (1) if the seniority system is *per se* unlawful, or (2) if the union insisted that it be administered in such a way as to constitute an unlawful employment practice. Neither appears.

Franks v. *Bowman Transportation Co., supra,* teaches that Section 703(h) of the Act "delineates which employment practices are illegal and thereby prohibited and which are not" — U.S. —, 47 L.Ed. 2d at 458. That section specifies "it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, . . . or national origin."

The legislative history redundantly declares that "Title VII would have no effect on established seniority rights." Without reiterating the legislative history and rationale discussed at length in *Franks* [60]— that the thrust of Section 703(h) of Title VII is the insulation of an otherwise bona fide seniority system from a challenge that it *per se* amounts to a discrimina-

[60] Majority Opinion at § II, headnotes 7 and and 8, at — U.S. —, 47 L.Ed. 2d at 458, Text at footnotes 11 through 18.
Dissent at — U.S. —, 47 L.Ed. 2d at 471.

tory practice because it perpetuates the effects of racial discrimination—we take it as established that continuation of a bona fide seniority is not, in itself, unlawful.

The proper inquiry, then, is as to the bona fides of this particular seniority system. The government asserted below that ". . . a system of seniority based on length of service in a job classification is itself unlawful under Title VII for all members of the class and must be changed in order to comply with the Act." [61]

Neither court below accepted that argument and neither would alter the seniority system. To the contrary, both made clear that the system was not *per se* violative of the statute. Indeed, every court of appeals which has examined the system has left it intact. In *Bing* v. *Roadway,* 485 F.2d 441 at 452, the Court of Appeals specified that ". . . the unions seniority system treat[s] new employees impartially." This, and similar seniority systems have often been before the courts, but have never been enjoined.[62]

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[61] *Supra,* pp. 12, 17. Government Brief to Court of Appeals, p. 39.

[62] *Jones* v. *Leeway Motor Freight,* 431 F.2d 245 (C.A. 10, 1970), was the first trucking case. It held "no transfer" unlawful, but "express[ed] no opinion on the seniority problems which may arise in the event that one of the plaintiffs qualifies and is accepted for a line [road] job." 431 F.2d at 250.

Witherspoon v. *Mercury Freight Lines, Inc.,* 457 F.2d 296 (C.A. 5, 1972), and *Belt* v. *Johnson Motor Lines, Inc.,* 458 F.2d 443 (C.A. 5, 1972), likewise addressed employer hiring discrimination—but not seniority. *Bing I (Bing* v. *Roadway Express,* 444 F.2d 687 (C.A. 5, 1971)), likewise enjoined "no transfer"—but did not speak to seniority; *Bing II (Bing* v. *Roadway Express,* 485 F.2d 441 (1973)), required transfer (city/road) of designated workers and awarded seniority "in order to make them whole" (at 450). Seniority was addressed: *"How much seniority the transferee deserves should be determined by the date he would have transferred but for his employer's discrimination;"* and specifically noted that "the union's seniority system treats new employees impartially" (at 452).

While in *Franks* v. *Bowman,* 495 F.2d 398 (C.A. 5, 1974), and in *United States* v. *Jacksonville Terminal* (451 F.2d 418) (C.A. 5, 1971), the Fifth Circuit wrote that departmental and "craft and class" systems were "discriminatory unlawful employment practice[s] under Title VII," in neither case did it abolish the system; rather it provided augmented seniority for the "discriminatees." 495 F.2d at 495.

Similarly, in subsequent motor carrier cases, the lower courts—though on occasion writing in terms of the illegality of the system—have never abolished it. Rather, they have left the system intact, while granting augmented seniority to individual victims of the discrimination. Usually, they have stated the rationale that this was to "make whole" the victims who were assigned the "rightful place" which would have been achieved absent the employer's discrimination.

As we shall see, *infra,* pp. 46-48, some of these courts actually granted preference on account of race, and did much more than "make whole." But the point here is that none of them has jettisoned the seniority system, which would have been the necessary result had the "departmental" or "classification" system actually been *per se* a discriminatory unlawful employment practice under Title VII.

The government's assertion that a seniority system which measures length of service in a job classification "is itself unlawful" is belied when Section 703(h) is considered against forty years of NLRB decisions which have defined units appropriate for purposes of collective bargaining. Conventional bargaining units at the time 703(h) was passed included industrial, craft, departmental, plant, employer, multi-employer, and various combinations thereof.[63] In providing in Section 703(h) that bona fide seniority systems are not violative of the Act, the Congress did not

[63] See Morris, *The Developing Labor Law,* ABA Section of Labor Relations Law, at Chapter 9, "Appropriate Bargaining Units", pp. 200-245, and cases there cited, Bureau of National Affairs, 1971.

speak only to industrial or plant-wide seniority. Seniority systems within smaller, or larger units were as bona fide as was the employer unit.[64]

Congress thus obviously was aware that any seniority system (industrial, craft, departmental, plant, employer, or multi-employer) tends in more or less degree to maintain relative status quo—or at least to govern employee movement. Yet it specifically provided in 703(h) that differences in wages or conditions resulting from bona fide seniority systems would not be "unlawful employment practices."

The bona fides of the system are further demonstrated by its history. The evolution and development described above (pp. 20 to 33) emphasize that which is implicit in the government's stipulation: that the bargaining patterns are not the result of an intention to discriminate because of race.

Maintenance of a seniority system created many decades ago by which separate seniority rosters for "road" and "city" motor carrier employees are continued, and competitive seniority is measured from date of entry into the classification, does not violate Title VII. This seniority system, provided in lawful collective bargaining agreements negotiated in good faith pursuant to the requirements of the National Labor Relations Act, and with no intent to discriminate on account of race, assures job security to workers who have had no hand in their employer's racial discrimination. The system applies equally to all workers, regardless of race, color or national origin on the basis

[64] A certified union bargains only within the scope of its certified unit. The Labor Act does not authorize bargaining for those outside the unit. *N.L.R.B.* v. *Pittsburgh, Plate Glass Co.*, 404 U.S. 157 (1971).

of entry date into the particular seniority classification. It is to be distinguished from systems involving "lines of progression," or those blocking promotion from unskilled entry level to skilled employment, for it does neither. It is likewise to be distinguished from seniority practices rooted in "racially segregated local unions," and those in which there is factual showing of employer-union connivance to maintain racial segregation.[65] For it equally affects white, black or brown (A. 49), who enter the job classification at top rate, and is a necessary protection of job security for workers of all races.

It is thus clear why the courts below have refused the Government's attempt to eliminate the existing seniority system—and why the Government has not sought review of that refusal. For here, as in *Franks,* while maintaining the present system, those adversely affected by the employer's racial discrimination in hire and assignment may be awarded "the seniority status they would have individually enjoyed under the present [seniority] system but for the [employer's] discriminatory refusal to hire [or transfer]." 47 L. Ed. 2d at 448.

[65] The Court of Appeals' attempt to equate this seniority system with those in *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (C.A. 5, 1971), cert. denied, 406 U.S. 906 (1971); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (C.A. 5, 1969); and *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va., 1968) will not do. Those cases are inapposite on the facts. They involve line-of-progression seniority systems in industrial plants, where minorities are limited to menial, entry-level jobs—and blocked from advancing by the seniority system established on a racial basis. Factual showings of segregated unions, and employer-union connivance to deprive minorities of job opportunity distinguish those cases from this. In none of them did the union, as here, advocate the grant of "rightful place" to victims of discrimination.

If the seniority system is not *per se* invalid, the question could remain—does the union insist that it be administered to "lock in" the victims of racial discrimination? The answer is "no." To the contrary, the union insisted upon, and the employer agreed to, Article 38 of the National Master Freight Agreement which provided (A. 816):

> The Employer and the Union agree not to discriminate against any individual with respect to his hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex, or national origin, nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of his race, color, religion, sex, or national origin.

Moreover, it is undisputed that the collective bargaining agreement is administered through a grievance procedure by which victims of discrimination, or those denied proper seniority, are regularly made whole by grievance awards ". . . including seniority if it is found that the employer should have put a man to work at a certain time and failed to give him his rights, full seniority." (A. 680.)[66]

Consistent with all the above, throughout this litigation, IBT has insisted that "Any blacks or SSA's as to whom there is evidence that they have been affected by racial discrimination should be accorded seniority

[66] That none of those asserted to be victims attempted to utilize this grievance and arbitration machinery may be some evidence that they were not adversely affected by T-DC's alleged discrimination.

However that may be, IBT should not be faulted for failure to provide a remedy, when no "victim" ever chose to initiate contract procedures to obtain seniority.

and all other contract rights as of the date of the proven unlawful discrimination—i.e., those who sought employment in a particular unit and were denied because of race should be held to have entered that employment as of the date of the unlawful discrimination—and this unit seniority should be allocated accordingly." IBT Brief to Court of Appeals at pp. 13-14.

This IBT position, urged throughout this litigation,[67] is wholly consistent with that announced in *Franks* v. *Bowman*, that racial victims are to be awarded "the seniority status they would have individually enjoyed under the present system but for the discriminatory refusal to hire." —— U.S. ——, 47 L.Ed.2d at 448.

We have shown that the seniority system does not violate the statute. Nevertheless, IBT is party to this action—and has always agreed that victims of racial discrimination should be "made whole." We are thus in a position similar to a Rule 19(a) defendant—properly in the litigation only so that full relief can be provided. Accordingly, we now address the issue of remedy.

2. The Proper Remedy for Unlawful Discrimination

A central purpose of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 at 418. To effectuate this "make whole" objective, Congress in § 706(g) vested broad equitable discretion in the federal district courts to

[67] Also urged by the union, and adopted by the District Court in *Bing* v. *Roadway*, See 485 F.2d at 451. Likewise, in *U.S.* v. *Leeway*, IBT urged the same position, See 1974 CCH—EPD para. 5285; See also *Thornton* v. *East Texas Motor Freight*, *supra* fn. 58; *Sagers* v. *Yellow Freight Systems, Inc.*, *supra* fn. 58.

"order such affirmative action as may be appropriate which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other relief as the court deems appropriate." *Ibid.*

The legislative history of the 1972 amendment to Title VII as noted in *Franks* demonstrates; —— U.S. ——, 47 L.Ed.2d at 461:

> [T]he Act is intended to make the victims of unlawful employment discrimination whole and . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. Section by Section Analysis of HR 1745, accompanying The Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972). This is emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring.

And as this Court further held in *Franks supra* at 461-462:

> Adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application. It can hardly be questioned that ordinarily such relief will be necessary to achieve the "make-whole" purposes of the Act.

The Act, its legislative history and the Court's interpretations all point to intent to "make whole."

At the same time, *Griggs*[68] teaches that no one is to receive preferential treatment, for "discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." 401 U.S. at 434.

Remedies under Title VII, like remedies provided under the National Labor Relations Act, 29 U.S.C. §160(c)—the model for § 706(g)—may include "affirmative action" redressing the wrongs incurred by an unlawful employment practice. But these, like the NLRB remedies upon which they are based, are designed to make "the employees whole, and thus restor[e] the economic status quo that would have obtained but for the company's wrongful [act]." *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 263, cited in *Franks* at —— U.S. ——, 47 L.Ed.2d at 464.

Albemarle, Franks and the long line of NLRB cases all require "make whole" remedies. These require "*an award of seniority equivalent to that which they would have enjoyed but for the illegal conduct.*" *Franks, supra* at 464.

The fashioning of appropriate decrees applying the above remedies "involves the sound equitable discretion of the district courts." *Franks, supra,* 47 L.Ed. 2d at 465.

In this case the District Court has exercised an informed discretion, and specified the rationale by which it arrived at a remedy, viz, P.A. 62:

> This Court, in fact, does hold that some were not injured by being a member of the class, and that those who were injured were injured in varying

[68] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

> degrees. There are no degrees of discrimination —discrimination is discrimination, and if made on the basis of race is deplorable whatever the degree; however, there *are* degrees of injury due to that discrimination—and this is important in determining the equitable relief this Court should afford these individuals.

Accordingly, the relief accorded by the trial court to minority employees was apportioned in accordance with the trial court's view of the degree to which each was damaged by the employer's racial discrimination. Four sub-groups of the minority employees were specified, and separate seniority remedies were tailored to the degree of injury which the trial court found had resulted from employer's racial discrimination. See pp. 13-15, *supra*.

The Court of Appeals rejection of the trial court's remedy was error. "Preference" was substituted for "make whole."

All minorities, the Court of Appeals says, are entitled to qualify for road jobs, "and, if they qualify for those jobs, to be permitted to exercise their full seniority in such jobs, including bidding and layoff." P.A. 34. The Circuit Court rules "that for all members of the class there should be full company employment seniority carryover for bidding and layoff purposes." (P.A. 38.)

There is no basis for an implied finding that all blacks and SSA city employees would have been on the road "but for" the employer's discrimination. To the contrary, there are trial court findings that 30 "have suffered severe injury;" others named "fall within a gray area" and were very possibly the objects

of discrimination and . . . were likely harmed," as to others "the evidence fails to show that there was any injury or harm to them as a result of the [employer's] discriminatory practices," and as to a final group there was "no evidence of discrimination against themselves . . ." (P.A. 64-65.)

These findings were not challenged as "clearly erroneous," or otherwise. Yet the Court of Appeals essayed a *de novo* assessment of the record, and concluded that regardless of whether they were victims of discrimination—all were entitled to seniority preference.

In so doing, it approved the very novel suggestion contained in the Government's brief [69] that "introduction of testimony . . . [as to the extent individuals seeking relief were damaged by racial discrimination] would be unduly burdensome on the parties and wasteful of the Court's time." The Court of Appeals itself concluded: ". . . it would defy reason and waste precious resources for the Court either to require or permit individualized proof for every member of a class here numbering nearly 400 . . ." (P.A. 34.)

The Court of Appeals thus has set aside the findings of the trial court which heard and determined such individualized proof involving those whom the Government had discovered as possibly racial victims and has granted to all—the few victims and the many non-victims alike—a seniority preference denied to whites.

And to compound the error, the Circuit Court refuses to apply "the analytical steps delineated by the recent case of *McDonnell Douglas* v. *Green*, 411 U.S. 792

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[69] Government Brief to Court of Appeals at p. 44.

(1973);" on the ground that criteria by which discrimination is proved in an individual's suit under §§ 703 and 704 are "inapplicable to a pattern and practice suit." 517 F.2d at 316; P.A. 27.

Respectfully, we suggest it does not make sense to accord more relief—or require a lesser proof—when the government sues, than when an individual makes the claim. In either instance, the inquiries are: was there racial discrimination—was the individual damaged thereby? What will it take to put the worker in the position he would have enjoyed absent discrimination? It will not do to evade these inquiries—and grant pay or seniority or other employment benefits solely on the basis of race.

The statistics as to road-city employment demonstrate [70] what the record testimony shows [71]—that many workers prefer city driving rather than the rigors of the road. There is no more basis to presume that all black's and SSA's would have preferred road work than that all whites would have done so. Accordingly, there is just no basis upon which it can be said that all blacks' and SSA's "rightful place" should be on the road. Yet that is the necessary unstated premise upon which all of them are granted seniority preference. Otherwise, the preference is granted solely to provide racial balance, a result which the statute forbids.

We have seen that § 704(j), 42 U.S.C. § 2000e2(j), bans "preferential treatment to any individual or to any group because of the race, color . . . or national origin of such individual or group on account of an im-

[70] *Supra*, p. 33.

[71] *Supra*, pp. 28-29.

balance which may exist with respect to the total number or percentage of persons of any race, color . . . or national origin employed by any employer . . . ."

The legislative history underlines clear congressional intention not to require achievement of racial balance by giving preferential treatment to any individual or group.[72]

Here, as in *Franks*, the Fifth Circuit failed to focus on the overall substance of Title VII. In *Franks*, it construed § 703(h) narrowly and out of context, and in refusing an appropriate "make whole" remedy, provided *less* remedy than the statute provides.

Here it reads § 703(g) broadly and out of context and thus provides *more* remedy than the statute permits. Respectfully, we submit that because the court below failed to focus on the broad design of Title VII, it construed that one section out of context and imported to it a meaning quite different from that intended by Congress. As we show, the central concern which preoccupied Congress in drafting Title VII was to be sure that it had made sufficiently plain the line between abolishing discrimination, which was its goal, and providing preferential treatment, which all members wished to preclude. The debate on the floor of Congress was not over whether that line should be drawn—everyone agreed that it should—but over what language was necessary to make that line unmistakably clear. Section 703(h) is but one of several provisions added to confirm this Congressional purpose. Prop-

[72] See "Legislative History of Titles VII and XI of Civil Rights Act of 1964," published by United States Equal Employment Opportunity Commission, at pp. 3005; 3187-3190; hereinafter referred to as "Leg. Hist."

erly construed, it precludes only "preferential" treatment. It merely accords a proven victim of discrimination his "rightful place": the place in the seniority system which he would be occupying but for the prior discrimination against him. The basic liability provisions, §§ 703(a), (c), speak of discrimination "against any individual," and the key remedial provision, § 706(g), states in its last sentence that courts may not furnish remedies to "an individual" unless he has proven that he has suffered employment disadvantage "on account of race, color, religion, sex or national origin." The drafters believed that these provisions, standing alone, made clear the dual Congressional objectives: on the one hand, to forbid discrimination and make discriminatees whole; on the other, to preclude preferential treatment of minorities *qua* minorities. As Senators Clark and Case, the floor managers of Title VII in the Senate, explained:

> "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section 707(e) [enacted as 706(g)] which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because or race, color, religion, sex or national origin."
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> "There is no requirement in title VII that an employer maintain a racial balance in his work force. * * * It must be emphasized that discrimination is prohibited as to any individual: While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against." [73]

But notwithstanding the clarity of the bill's original language, there developed concern that Title VII would confer preferential rights upon minorities at the expense of the majority. The minority members asserted that the bill "under the cloak of protecting the civil rights of certain minorities, will destroy civil rights of all citizens of the United States who fall within its scope." [74] They listed a number of interests which would be "seriously impair[ed] by the passage of the bill." [75] Among these were the "seniority rights of employees in corporate and other employment." [76] They warned that Title VII "would destroy seniority." [77] They asserted that the bill's "true interest and purpose" was to achieve racial balance, not merely to end discrimination.[78] Dramatizing the threat to seniority which they perceived, the minority members declared:

> "*The provisions of this act grant the power to destroy union seniority.* The action of the Secretary of Labor already mentioned is merely the beginning, if this legislation is adopted. With the full statutory powers granted by this bill, *the*

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[73] Leg. Hist. 3044, 3040.

[74] Leg. Hist. 2064.

[75] *Ibid.*

[76] *Id.*, 2065.

[77] *Id.*, 2066.

[78] *Id.*, 2067-68.

extent of actions which would be taken to destroy the seniority system is unknown and unknowable.

"To disturb this traditional practice is to destroy a vital part of unionism. Under the power granted in this bill, if a carpenters' hiring hall, say, had 20 men awaiting call, the first 10 in seniority being white carpenters, the union could be forced to pass them over in favor of carpenters beneath them in seniority, but of the stipulated race. And if the union roster did not contain the names of the carpenters of the race needed to 'racially balance' the job, the union agent must then go into the street and recruit members of the stipulated race in sufficient number to comply with Federal orders, else his local could be held in violation of Federal law.

"Neither competence nor experience is the key for employment under this bill. Race is the principal, first, criterion." [79]

These accusations prompted a number of the bill's sponsors in the House to submit a statement of "additional views," in which they sought to allay the fears which the minority members had voiced.[80]

These assurances were sufficient for House passage. Senate opponents remained to be convinced.

Accordingly, the bill's Senate sponsors gave the assurances set forth in footnotes 12 through 17 of this Court's *Franks* Opinion, — U.S. —, 47 L.Ed. 2d at 458-460. A Department of Justice memorandum, submitted by Senator Clark, gave further assurance, viz.:

> "Finally, it has been asserted that title VII would impose a requirement for 'racial balance.' This is incorrect. There is no provision either in title VII or in any other part of this bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or treatment for any individual or any group for the purpose of achieving racial balance. No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites, Jews to gentiles, Italians to English, or women to men. The same is true of labor organizations. . . ." [81]

[79] *Id.*, 2071 (emphasis in original).

[80] *Id.*, 2150 ff.

Despite these efforts to set fear at rest, it became necessary, in order to secure sufficient votes to end the filibuster, to include express language dealing with the subjects of racial balance and seniority (the present §§ 703(j) and (h)) as part of the package of amendments known as the Mansfield-Dirksen compromise. Senator Humphrey explained the sponsors' reason for accepting § 703(j):

> "* * * A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning." [82]

[81] *Id.*, 3244-45.

[82] *Id.*, 3005.

The legislative history thus confirms that while Congress intended the proven victims of discrimination to be made whole, it did not permit anyone to receive preferential treatment. "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). That is what the original substantive (§§ 703(a), (c)) and remedial (§ 706(g)) provisions of Title VII declared. That is what the legislation's sponsors stated again and again throughout the debates. Sections 703(h) and (j) were added—at the insistence of those whose votes were necessary to obtain passage of the bill—to make absolute that the statute could not be otherwise construed.

But the Court of Appeals' modifications of the collective bargaining agreement's job protection for laid-off employees, in the form of three-year recall rights (P.A. 41) and inter-terminal "bumping" rights for Southern road drivers (P.A. 42) do misconstrue this statute. For § 703(f) precludes racial preference, even for the purpose which the lower courts have viewed as beneficent, to "speed up the advancement of discriminatees into the LD [road] position." (P.A. 43).

Neither the three-year contractual recall rights for those incumbents who had been laid off, nor the "bumping" rights which the contract guarantees Southern area drivers was aimed at racial discrimination. Each is a conventional, valid collective bargaining aim which any union would seek for the protection of those it represents. Indeed, the Court of Appeals recognizes "that the Union contract provision [regarding recall rights] was not adopted for discriminatory purposes." (P.A. 41).

Yet the Court of Appeals quite candidly tailors the remedy here for the very purpose which Congress has proscribed to accelerate movement of minorities from city to road.[83]

In these circumstances, to do more than restore "rightful place"—to rewrite labor contracts "to speed up the advancement" of minorities is more than "make whole;" it is impermissible racial preference which the statute forbids.

CONCLUSION

We have shown that IBT has not engaged in any unlawful employment practice under Title VII, and that any employer violation may be wholly remedied by application of the suggestion made by IBT: placement of discrimination victims in the seniority positions each would have enjoyed "but for" the unlawful discrimination, consistent with this Court's *Franks* opinion.

This result accomodates the requirements of both the National Labor Relations Act[84] and Title VII. Every union which represents a mix of workers must comply with both the duty of fair representation under the former[85] and the ban against racial discrimination under the latter.

Those dual responsibilities, owed to employees of *all* races, colors and national origins, require unions to walk a narrow line. The Court of Appeals skews the balance when it decrees that blacks are to have senior-

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[83] See P.A. 31-32; 41; 43.

[84] 29 U.S.C. Secs. 151 ff.

[85] Cf., Vaca v. Sipes, 386 U.S. 171 (1967).

ity preference, just because they are black. The union must be permitted to meet its obligations under both acts, and to maintain its bona fide seniority system, subject to "rightful place" seniority for discriminatees.

For the reasons stated, the decision below should be reversed, the finding that IBT violated Title VII vacated, and the District Court directed to fashion a "make whole" seniority remedy only for the individual victims or racial discrimination.

Respectfully submitted,

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